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No. 10-377

In The
Supreme Court of the United States

CHRISTOPHER MCDONOUGH,

Petitioner,

vs.

MICHAEL CROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does use of a suspect's coerced testimony in a judicial proceeding short of a criminal trial in which penalties may be imposed violate the Fifth Amendment?

2. Do routine police interview techniques that have garnered widespread judicial approval, such as lying to a suspect, accusing a suspect of lying, telling a suspect that physical evidence connects him to a crime and implying that others have implicated him in a crime, constitute coercion under the Fifth Amendment when applied to a minor?

3. Can a police officer's solely verbal conduct that does not involve any threat of harm constitute a violation of the Fourteenth Amendment's guarantee of substantive due process?

4. In order to constitute a violation of the Fourteenth Amendment's guarantee against deprivation of familial companionship, must a police officer's conduct "shock the conscience," as stated by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 846-48 & n.8 (1998) ("*Lewis*"), or must it merely constitute "unwarranted interference" with the family's relationships, as articulated by the Ninth Circuit?

5. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a police officer may be liable under 42 U.S.C. § 1983 for interrogating a minor suspect using routine, solely verbal interrogation techniques that involved no threats of any kind?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, and defendant below, is individual Christopher McDonough.

Respondents, and plaintiffs below, are individuals Michael Crowe; Stephen Crowe; Cheryl A. Crowe; Shannon Crowe, a minor, through guardian ad litem Stephen Crowe; Judith Ann Kennedy (deceased); Margaret Susan Houser; Gregg Houser; and Aaron Houser.

Additional defendants below, who are not parties to this petition, but who remain defendants, are individuals Mark Wrisley; Barry Sweeney; Ralph Claytor; and Phil Anderson (collectively, the "Escondido defendants"), and Lawrence Blum, Ph.D.[1] Other defendants below, who were dismissed from the case but named in the caption on appeal, are City of Oceanside; City of Escondido; County of San Diego; Summer Stephan; Gary Hoover; Rick Bass and the National Institute for Truth Verification, a Florida limited liability company.

Additional plaintiffs below, who were dismissed from the case but named in the caption on appeal, are individuals Zachary Treadway; Joshua David Treadway; Michael Lee Treadway; Tammy Treadway; Janet Haskell; and Christine Huff.

There are no corporations involved in this proceeding.

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[1] The Escondido defendants and Dr. Blum are filing separate petitions for certiorari raising some of the same issues raised in the present petition.

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OPINIONS BELOW

The Ninth Circuit's initial opinion was designated for publication but did not appear in the official reports. (App. 5.)[2] The Ninth Circuit's order amending that opinion was published at 593 F.3d 841 (9th Cir. 2010) but it too was amended and superseded. (App. 86-89.) The judgment and opinion that is the subject of this petition is published at 608 F.3d 406. (App. 5-82.)

The district court orders granting in part defendants' motions for summary judgment are reported at 303 F.Supp.2d 1050 (S.D. Cal. 2004) and 359 F.Supp.2d 994 (S.D. Cal. 2005). (App. 90-196; 197-356.)

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit filed its opinion on January 14, 2010, but amended it on January 27, 2010. (App. 5, 86-89.) Petitions for panel rehearing and rehearing en banc were denied on June 18, 2010, and final judgment was entered that same day. (App. 5-82.) 28 U.S.C. § 1254(1) confers jurisdiction on the Court to review the second amended opinion issued on June 18, 2010.

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[2] All citations to the Appendix herein are to the Petitioners' Appendix attached to the Escondido defendants' petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment (Section I): No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (2009): Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

> the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

A. Background.

Sometime between 10:00 and 11:00 p.m. on January 20, 1998, 12-year-old Stephanie Crowe was stabbed to death in her bedroom. (App. 201.) No one heard her scream. (App. 111.) The family dog did not bark. *Id.* And when officers from the Escondido Police Department arrived to investigate the following morning, they found no sign of forced entry. (App. 11.) Thus, they suspected the murder was an inside job. (*See* App. 111.)

The morning after the murder, Escondido officers questioned Stephanie's 14-year-old brother, Michael Crowe. (App. 109, 201.) He reported leaving his bedroom at 4:30 a.m. to go to the kitchen. (App. 112, 119-24, 201.) Although the position of his sister's body would have made it impossible for her bedroom door to be closed, Michael reported seeing Stephanie's door shut at that time. (App. 112, 115, 119-24.) The inconsistencies in Michael's story, coupled with the evidence suggesting that the murderer was someone

Stephanie knew, led the Escondido officers to suspect Michael. (*See* App. 12-13, 111.)

The Escondido Police Department asked the Oceanside Police Department to send an officer who knew how to operate a "computer voice stress analyzer" ("CVSA"). (App. 215.) On January 22, Oceanside sent a detective, petitioner Christopher McDonough to assist. *Id.*

McDonough conducted only one interview of Michael. (App. 14-15, 216.) McDonough's participation in that interview lasted about two hours. McDonough maintained a calm tone throughout; he never accused Michael of killing his sister and he never threatened Michael with punishment. (*See* App. 176 ["Defendants did not yell at Michael or even raise their voices"].) Michael asserted his innocence throughout McDonough's interview and never made any incriminating statements during it.

Here is the entirety of the Ninth Circuit's description of what happened in McDonough's interrogation of Michael:

> After Michael recounted the same series of events and again expressed how stressful the past two days had been, McDonough introduced the computer stress voice analyzer. McDonough told Michael the stress voice analyzer "was controlled by the government for a long time, okay, because it was so accurate." Detective McDonough asked Michael a long series of "yes or no" questions, including both control questions and questions specific

> to Stephanie's death. McDonough then reviewed the results with Michael and told him that the test "showed that you had some deception on some of the questions." McDonough asked him, "Is there something, though, that maybe you're blocking out ... in your subconscious mind that we need to be aware of?" McDonough pressured Michael about whether there was something Michael needed to confess, which Michael repeatedly denied. At this point (Escondido) Detective Claytor took over the interview. (App. 15.)
>
> (Escondido detective) Claytor next introduced the idea that Michael killed Stephanie but did not remember it. Michael started repeating over and over that he didn't remember doing anything. He also asked Claytor if he was sure Michael had done it, to which Claytor responded, "I'm sure about the evidence. Absolutely." At this point Claytor left and McDonough resumed the interview. As Claytor left Michael sobbed, "God. God. Why? Why? Why? Oh, God. God. Why? Why? I don't deserve life. I don't want to live. I can't believe this. Oh, God. God. Why? Why? How could I have done this? I don't even remember if I did it." When McDonough entered the room, Michael continued to state that he didn't remember and asked "How can I not remember doing something like that? That's not possible." The interview ended shortly thereafter. (App. 16-17.)

After the interview, McDonough left Escondido and had no further involvement in Escondido's

investigation of Michael. (App. 216.) McDonough did not participate in Escondido's further questioning of Michael; he was not present at, nor did he give input regarding, the questioning that ultimately led to Michael's confession that he had killed his sister. (App. 216; *see also* App. 17-24 [describing the further questioning without mentioning McDonough].)

During the next several weeks, Escondido's investigation broadened to include two of Michael's friends, 14-year-old Joshua Treadway and 15-year-old Aaron Houser. (App. 202-04.) A knife belonging to Aaron was found under Joshua's bed. (App. 204.) In interviews with police, Joshua subsequently admitted that Aaron had given him a knife and told him that the knife was the knife used to kill Stephanie, and that Aaron had participated in the killing with Michael.[3] (App. 204-07.) The knife used to kill Stephanie fit the description of Aaron's knife. (App. 203.)

On February 11, McDonough responded to Escondido's request to perform a CVSA interview of Aaron Houser. (App. 25.) By then, Escondido's detectives had already interviewed Aaron twice, without McDonough's involvement. (App. 25, 217.) The Escondido detectives had also already placed Aaron under arrest, again without McDonough's involvement. (*See* App. 25.)

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[3] Both the trial court and the district court found these statements were "voluntary and not coerced." (App. 256-57, 261.)

Over the course of nine and a half hours, Aaron was interviewed by McDonough, as well as three Escondido detectives. (App. 25.) Here is the entirety of the Ninth Circuit's description of McDonough's interview of Aaron:

> McDonough began the interrogation with the stress voice analyzer, describing it has (sic) he had for Michael. Eventually he began to ask Aaron to "theoretically" describe how he, Michael, and Joshua would each respectively kill Stephanie, if they were going to do so. McDonough suggested details to the story, through questions regarding what clothing Aaron would wear and how he would get rid of it, whether he would wear gloves, what time he would pick, and how he would get into the house. Later, McDonough told Aaron that Joshua and Michael had both said Aaron helped them kill Stephanie. Aaron denied it. Then McDonough told Aaron that the computer stress voice analyzer indicated that he was definitely involved. At this point Aaron began to even more vehemently protest his innocence:
>
> A. Let me put it this way: I don't know anything. I don't know who did. I don't know a single thing. I'm doing my best to tell the truth.
>
> Q. Aaron, calm down.
>
> A. I'm telling the truth to the best of my ability.
>
> Q. Calm down.

A. How can I calm down? I'm being accused of murder?

Q. Relax, Aaron.

A. How?

Q. Relax.

A. How? Relax how?

...

Q. You need to help yourself in the situation here, son.

A. What do I do?

Q. Tell the truth.

A. I did and you said I lied.

Q. Yes.

A. Okay.

Q. You lied. You have lied.

McDonough also told Aaron they had physical evidence against him and implied that they would soon uncover more. (App. 26-27.)

Like Michael, Aaron maintained his innocence throughout McDonough's interview. (App. 28.) When McDonough finished interviewing Aaron, he left Escondido and had no further involvement in Escondido's investigation into Stephanie's murder. (App. 217-18.)

After Escondido charged Michael and Aaron with Stephanie's murder, the boys' interviews were used during various pretrial proceedings – a "*Dennis H.* Hearing,"[4] grand jury proceedings and a "707 Hearing".[5] (App. 30-31.) During those pretrial proceedings, the trial judge reviewed the interview tapes and concluded that (1) McDonough's questions to Michael were not coercive and (2) Aaron's statements to McDonough were voluntary and not the result of coercion. (App. 205, 284.)

The District Attorney later dismissed the charges against the boys and they were never tried for Stephanie's murder. (App. 32-33.)

B. District Court Proceedings.

After the District Attorney dropped the charges against Michael and Aaron, they and their families filed a joint complaint naming numerous defendants, including McDonough. (App. 33.) As to McDonough, the complaint alleged conspiracy to violate, and violation of, plaintiffs' Fourth, Fifth and Fourteenth

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[4] Under California law, when a minor is taken into custody, he must be released within 48 hours, unless, *inter alia*, a petition is filed in the juvenile court explaining why he should be declared a ward of the court. The hearing on that petition called a "*Dennis H.* Hearing." *See* Cal. Welf. & Inst. Code § 631 (2008); *see also* App. 31, n.7.

[5] A "707 Hearing" determines whether a minor should be tried as an adult. *See* Cal. Welf. & Inst. Code § 707 (2008); *see also* App. 31, n.9.

Amendment rights in contravention of 42 U.S.C. § 1983.

McDonough moved for summary judgment on the claims against him. (App. 34, 213.) The district court granted McDonough's motions on February 17, 2004 and February 28, 2005. (App. 34.) It entered judgment on July 26, 2005.

C. The Appeal.

The Crowe and Houser plaintiffs (collectively, "plaintiffs") appealed. (App. 34.) They challenged the judgment in favor of McDonough as to the following theories: (1) conspiracy to violate the boys' Fourth Amendment rights, (2) violation of the boys' Fifth Amendment right against compelled self-incrimination, (3) violation of the boys' Fourteenth Amendment right to be free from coercive interrogations that "shock the conscience," and (4) violation of the boys' parents' Fourteenth Amendment rights to familial companionship. *Id.*[6]

On January 14, 2010, the Ninth Circuit issued an opinion affirming in part and reversing in part the district court's grant of summary judgment. The court affirmed the grant of summary judgment for

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[6] Plaintiffs also appealed as to other defendants, and City of Escondido, Wrisley, Sweeney, Anderson, and Claytor cross-appealed the district court's denial of summary judgment as to certain claims against them. (App. 34-35.) Disposition of those other claims is not at issue here.

McDonough on the plaintiffs' Fourth Amendment conspiracy claims. However, the court reversed the grant of summary judgment as to McDonough on the other appealed claims.

On the compelled self-incrimination claim, the Ninth Circuit concluded that *Chavez v. Martinez*, 538 U.S. 760 (2003) permits § 1983 claims for Fifth Amendment violations based on the use of testimony in a pretrial proceeding. (App. 36-44.) The Ninth Circuit also held that McDonough was not entitled to qualified immunity for any Fifth Amendment violation, reasoning that "[i]n 1998, when defendants interrogated Michael and Aaron, the clearly established rule in this Circuit was that a § 1983 cause of action for a violation of the Fifth Amendment's Self-Incrimination Clause arose as soon as police employed coercive means to compel a statement." (App. 44-45, citing *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009) ("*Stoot*") and *Cooper v. Dupnik*, 963 F.2d 1220, 1242 (9th Cir. 1992) ("*Cooper*"), overruled on other grounds by *Chavez*, 538 U.S. 760.)

On the Fourteenth Amendment claim for coercive interrogation, the Ninth Circuit found that the interrogations shocked the conscience even though they involved no threats or physical violence. (App. 45-47.) Again, the Ninth Circuit held McDonough was not entitled to qualified immunity, reasoning that "it was clearly established, at the time of the boys' interrogations, that the interrogation techniques defendants chose to use 'shock the conscience.' Defendants had the benefit of this Court's holding in *Cooper*, as well

as Supreme Court case law directing that the interrogation of a minor be conducted with 'the greatest care,' *In re Gault*, 387 U.S. at 55." (App. 48.)

On the familial companionship claim, the Ninth Circuit rejected the usual Fourteenth Amendment "shocks the conscience" standard, and concluded that the detentions were actionable because they were an "unwarranted interference" with the families' relationships. (App. 70 n.23.)

D. The Ninth Circuit Twice Amends Its Opinion.

Because the disposition section of the Ninth Circuit's January 14, 2010 opinion was inconsistent with the body of the opinion, the Ninth Circuit sua sponte issued an order amending the disposition section of its opinion on January 26, 2010. (App. 87-89.) The amended opinion was substantively identical to the original opinion as to McDonough.

McDonough petitioned for panel rehearing and rehearing en banc following issuance of the amended opinion. Other parties filed petitions for rehearing as well. On June 18, 2010, the Ninth Circuit issued an order denying the petitions for rehearing but further amending the opinion. (App. 6-9.) The amendments further corrected the disposition summary but did not change the substance of the opinion.

REASONS TO GRANT THE PETITION

Review is necessary to resolve an express circuit conflict concerning whether use of coerced testimony in pretrial criminal proceedings violates the Fifth Amendment. A plurality of this Court has suggested that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." *Chavez*, 538 U.S. at 769. However, the Court has never decided what constitutes a "criminal case." Two circuits have drawn a distinction between use of compelled testimony in the *charging* context and use of such testimony in the *ultimate adjudicatory* context, holding that the former does not violate the Fifth Amendment. In the present case, the Ninth Circuit has joined two other circuits in holding the exact opposite, concluding that use of statements in pretrial proceedings *can* violate the Fifth Amendment.

It is vital that the Court address and resolve this conflict among the circuits. High-stakes civil lawsuits frequently result from pretrial use of a suspect's testimony. The outcome of such claims should not turn on where in the country they arise. Granting review would allow the Court to articulate a uniform, bright-line test as to when such claims are viable. It would also greatly assist the day-to-day work of prosecutors and police officers throughout the country as they decide how to conduct interrogations and whether and when to use a suspect's testimony. These government officials must be able to predict with

some certainty the circumstances under which they may properly use testimony.

Review is also necessary to delineate what constitutes coercive interrogation of a minor under the Fifth Amendment. The Ninth Circuit's opinion exposes officers to liability for routine interrogation techniques – i.e., lying to the suspect, accusing the suspect of lying, and implying that others have implicated the suspect. Case law upholds the use of these techniques in most circumstances. If they are unconstitutional, or if there are special rules for interrogating minors, police officers and the academies that train law enforcement personnel need to know. Moreover, so long as the Ninth Circuit's opinion in the present case is binding authority on lower courts, public entities across the country will be vulnerable to lawsuits brought on the basis of what, until now, were well-established, judicially sanctioned interrogation techniques.

Review is also necessary to resolve whether a police officer's solely verbal conduct involving no threats of any kind violates the Fourteenth Amendment. The Court has held that a violation of substantive due process under the Fourteenth Amendment requires conduct that "shocks the conscience." *Lewis*, 523 U.S. 833. The circuits have uniformly held that only episodes of extreme physical brutality or credible threats of physical force meet this stringent standard and have repeatedly rejected claims based on mere verbal conduct or harassment. Yet in the present case, the Ninth Circuit has parted company with

these other circuits, holding instead that non-threatening verbal conduct suffices. Given the frequency of police interrogations, it is vitally important that the Court resolve the split among the circuits regarding when purely verbal conduct constitutes "conscience-shocking" interrogation – and specifically, whether there is a special rule for minors. Without clarification of the law, the Ninth Circuit's opinion in this case will open the gates to a flood of litigation against public entities and law enforcement officers.

Finally, review is necessary because the Ninth Circuit has disregarded this Court's holding that *any* Fourteenth Amendment substantive due process claim hinges on whether the challenged conduct "shocks the contemporary conscience." *See Lewis*, 523 U.S. at 836, 847 n.8. The opinion below carves out a special rule for substantive due process claims alleging deprivation of familial companionship, holding that the plaintiff must only establish "unwarranted interference" to establish such a claim, not conduct that "shocks the conscience." (App. 70 n.23.) That standard is contrary to *Lewis* and to other published federal appellate decisions. Because virtually any detention of a minor raises the specter of a deprivation of familial relationship claim, it is critically important that the Court resolve the confusion created by the Ninth Circuit's decision.

I. REVIEW IS NECESSARY TO RESOLVE AN EXPLICIT CONFLICT BETWEEN THE CIRCUITS ON THE IMPORTANT AND RECURRING ISSUE WHETHER USE OF COERCED TESTIMONY IN PRETRIAL PROCEEDINGS VIOLATES THE FIFTH AMENDMENT.

A. The Court Has Never Delineated What Constitutes A "Criminal Case" For Purposes Of Establishing A "Use" Violation Under The Fifth Amendment.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. As relevant here, the Fifth Amendment bars the prosecution from using coerced testimony in a "criminal case." *Chavez*, 538 U.S. at 769 (plurality opinion) ("[M]ere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness.").

However, this Court has left open what constitutes a "criminal case," expressly concluding in *Chavez* that it "need not decide today the precise moment when a 'criminal case' commences...." *Chavez*, 538 U.S. at 766-67.

B. There Is An Explicit Conflict Among The Circuits Regarding Whether "Criminal Case" Means Only A Suspect's Case-In-Chief Or Whether It Encompasses Pretrial Proceedings As Well.

In the seven years since *Chavez*, five circuits have split on the vitally important issue whether pretrial proceedings constitute a "criminal case" for purposes of the Fifth Amendment – that is, whether use of a coerced confession in pretrial proceedings is unconstitutional.

1. The Third and Fourth Circuits have rejected Fifth Amendment claims based on pretrial use of a suspect's statements.

The Third and Fourth Circuits have expressly declined to find Fifth Amendment violations when compelled testimony is used in the *charging* context rather than the *ultimate adjudicatory* context:[7]

In *Renda v. King*, 347 F.3d 550 (3rd Cir. 2003), the police subjected a suspect to a custodial interrogation without *Miranda* warnings. The prosecution later used the suspect's un-*Mirandized* statements to

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[7] In addition, the Fifth Circuit has stated in dicta that "[t]he Fifth Amendment privilege against self-incrimination is a fundamental trial right which can be violated only *at* trial, even though pre-trial conduct by law enforcement officials may ultimately impair that right." *Murray v. Earle*, 405 F.3d 278, 285 (5th Cir. 2005) (emphasis in original).

obtain an indictment. *Id.* at 552. As in the present case, the prosecution dropped the charges prior to trial and the suspect subsequently filed a § 1983 claim asserting that the police had violated her Fifth Amendment rights. *Id.* at 553. Citing *Chavez*, the Third Circuit affirmed the dismissal of the suspect's Fifth Amendment claim because "it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Id.* at 559.

Similarly, in *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005), the Fourth Circuit relied on *Chavez* to hold that a motorist who had been served with a summons and charged with obstruction of justice because he declined to produce proof of automobile insurance, could not state a Fifth Amendment violation. On appeal from the district court's dismissal of the action, the Fourth Circuit held that Burrell's § 1983 suit was precluded by *Chavez,* which required that one be "'compelled to be a witness against himself in a criminal case'" before "'a violation of the constitutional right against self-incrimination occurs.'" *Burrell*, 395 F.3d at 513-14 (emphasis omitted) (citing *Chavez*, 538 U.S. at 770).

2. The Second, Seventh and Ninth Circuits hold that pretrial use of a suspect's statements may violate the Fifth Amendment.

Three other circuit courts have come to the exact opposite conclusion of *Renda* and *Burrell. Sornberger*

v. City of Knoxville, 434 F.3d 1006 (7th Cir. 2006) and *Weaver v. Brenner*, 40 F.3d 527 (2d Cir. 1994) held that use of a coerced statement at *any* criminal proceeding against the declarant violates his or her Fifth Amendment rights. *Weaver*, 40 F.3d at 535-36 (use at grand jury); *Sornberger*, 434 F.3d. at 1026-27 (use at probable cause hearing); *see also Higazy v. Templeton*, 505 F.3d 161, 170, 173 (2d Cir. 2007) (reaffirming Second Circuit's pre-*Chavez* ruling in *Weaver v. Brenner*; held, government's use of suspect's statements against him at preliminary bail hearing was sufficient basis for alleging Fifth Amendment violation).

In so holding, both the Second and Seventh Circuits relied upon cases stating the rule that the privilege against self-incrimination permits a suspect to *decline to testify* at any time starting at a custodial interrogation. *Sornberger*, 434 F.3d at 1027 n.15 ("[P]recedent confirms that the right to be free from self-incrimination may attach at pre-trial stages of the criminal prosecution."); *Weaver*, 40 F.3d at 535 (same). In essence, *Sornberger* and *Weaver* reasoned that because the right to remain silent applies prior to the beginning of the prosecution's case-in-chief, so does the prohibition against using compelled testimony.

But the breadth of the right to decline to speak is not coextensive with the breadth of the prohibition against the use of compelled testimony in a "criminal proceeding." This Court held as much in *Chavez* when it stated: "Although Martinez contends that the

meaning of 'criminal case' should encompass the entire criminal investigatory process, including police interrogations, we disagree.... We need not decide today the precise moment when a 'criminal case' commences; it is enough to say that police questioning does not constitute a 'case'...." *Chavez*, 538 U.S. at 766-67 (plurality opinion).

Neither *Sornberger* nor *Weaver* considered the distinction between the broad reach of the Fifth Amendment as applied to the prophylactic right to remain silent and the narrower reach of the Fifth Amendment as applied to "use" violations. Nonetheless, in *Stoot*, 582 F.3d 910, the Ninth Circuit joined the Second and Seventh Circuits in holding that pretrial use of a suspect's testimony could violate the Fifth Amendment. As *Stoot* explained: "The Stoots' Fifth Amendment claim in this case falls squarely within the gray area created by *Chavez*. Unlike Martinez, who was never charged with any crime, Paul's statements were used against him in (1) the Affidavit filed in support of the Information charging him with child molestation; (2) a pretrial arraignment and bail hearing; and (3) a pretrial evidentiary hearing to determine the admissibility of his confession." *Id.* at 923-24. The Ninth Circuit held that the first two of "these forms of reliance on Paul's statements constitute 'use' in a 'criminal case' under *Chavez*." *Id.* at 924.

In so holding, the Ninth Circuit expressly stated that it was "adopt[ing] the general approach of *Sornberger* and *Higazy*: A coerced statement has been

'used' in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine pretrial custody status." *Id.* at 925 ("We therefore join the Second and Seventh Circuits in holding that use of the coerced statements at trial is not necessary for Paul to assert a claim for violation of his rights under the Fifth Amendment." (emphasis omitted)).

In the present case, the Ninth Circuit has again held that use of a suspect's testimony in proceedings short of a criminal trial violates the Fifth Amendment. The two minor plaintiffs in the present case were never brought to trial. Their allegedly coerced confessions were used only in pretrial proceedings to retain them in custody and determine whether they would be tried as juveniles or adults, as well as in a grand jury proceeding. None of these proceedings were criminal trials – i.e., they were not proceedings that could "lead to the infliction of criminal penalties" *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

C. It Is Essential That The Court Grant Review To Resolve The Circuit Conflict.

It is necessary for the Court to resolve the conflict as to whether use of coerced testimony in pretrial proceedings violates the Fifth Amendment. Public entities and law enforcement officers regularly face lawsuits based on interrogations and the resulting

testimony. Prosecutors, on a daily basis, must make decisions regarding if and how a criminal defendant's statements will be used in a particular proceeding. Granting review would allow the Court to articulate a bright-line test as to when Fifth Amendment claims may be brought on the basis of use of coerced statements at proceedings short of an actual criminal trial. This would provide certainty on the front lines of the criminal justice system regarding what is and is not allowed, eliminating confusion in both civil and criminal cases.

II. REVIEW IS NECESSARY TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS ON THE CRITICALLY IMPORTANT QUESTION OF WHAT CONSTITUTES COERCIVE INTERROGATION OF A MINOR SUSPECT.

The Ninth Circuit's opinion also creates a circuit split on the issue whether certain routinely-used interrogation techniques constitute coercion for purposes of a Fifth Amendment claim.

McDonough used garden variety police interrogation techniques that have garnered widespread judicial approval for decades – he accused a suspect of lying, he implied that others had implicated the suspect in the crime and he touted the accuracy of the CVSA machine.

The Ninth Circuit concluded this conduct could be found coercive. This holding places the Ninth

Circuit squarely at odds with uniform case law approving the exact interrogation techniques that McDonough employed.

The youth of the suspects does not obviate the confusion created by the Ninth Circuit's opinion. While the Court has spoken generally of the need to treat the interrogation of minors with greater sensitivity than the interrogation of adults, it has never delineated whether and when the routine techniques that McDonough employed here constitute coercion.

A. The Ninth Circuit Opinion Draws Into Question Routine Interrogation Techniques That Until Now Have Garnered Widespread Judicial Acceptance.

The Court regularly balances the need for effective police questioning against the need to safeguard against coercive interrogation. The Court has recognized that "'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted. Admissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). Nevertheless, "the interrogation process is 'inherently coercive' and ... , as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Id.*

Thus, the *sine qua non* of coercion is compulsion – i.e., undermining the suspect's ability to exercise his free will. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) ("[T]he touchstone of the Fifth Amendment is compulsion."); *Cunningham v. City of Wenatchee*, 345 F.3d 802, 810-11 (9th Cir. 2003) (compulsion requires overcoming the suspect's free will).

The federal courts have repeatedly held that the interrogation techniques used in the present case do not meet this standard. *See, e.g.*, *Cunningham*, 345 F.3d at 810-11 (eight-hour interrogation *not* coercive where the officer never yelled or used violence or the threat of violence, and where he did not refuse to give the suspect a break for food; rejecting suspect's argument that police had undermined his free will through deception, fear, fatigue, threats of punishment and promises of leniency); *Pollard v. Galaza*, 290 F.3d 1030, 1033-34 (9th Cir. 2002) ("[M]isrepresentations made by law enforcement in obtaining a statement, while reprehensible, does [sic] not necessarily constitute coercive conduct"); *Wiley v. Mayor & City Council of Baltimore*, 48 F.3d 773 (4th Cir. 1995) (police may misrepresent polygraph results; use of polygraph is not psychological coercion); *Contee v. United States*, 667 A.2d 103 (D.C. 1995) (officers are allowed to misrepresent capabilities of CVSA, including results of test); *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (9th Cir. 1997) (officers' repeated insistence that the suspect tell the truth did not amount to coercion); *Wyrick v. Fields*, 459 U.S. 42, 48 (1982)

(rejecting rule that "use of polygraph 'results' in questioning ... [that] is inherently coercive").

California law is in accord. It holds that police may misrepresent the evidence against a suspect, including falsely telling a suspect that physical evidence has connected him to the crime or that an accomplice has confessed. *See, e.g.*, *People v. Farnam*, 47 P.3d 988 (Cal. 2002) (police told suspect his fingerprints were found on victim's wallet); *People v. Watkins*, 85 Cal. Rptr. 621 (Cal. Ct. App. 1970) (police told suspect his fingerprints were found on getaway car); *People v. Parrison*, 187 Cal. Rptr. 123 (Cal. Ct. App. 1982) (police told suspect that evidence showed he had handled gun); *People v. Felix*, 139 Cal. Rptr. 366 (Cal. Ct. App. 1977) (police told suspect that accomplice confessed).

In addition, the police can bring a suspect in for questioning under false pretenses, including failing to tell him that he is part of a criminal investigation. *See, e.g.*, *People v. Chutan*, 85 Cal. Rptr. 2d 744, 746-47 (Cal. Ct. App. 1999) (police told child molestation suspect that they wanted to talk to him about his children, but failed to disclose that the interview was part of a criminal investigation).

The Ninth Circuit's decision in the present case has thrown the law into disarray by concluding that the very same techniques that courts across the country have approved for decades run afoul of the Fifth Amendment.

Moreover, the Ninth Circuit's decision casts doubt on what constitutes compelled testimony. McDonough's interrogation yielded no confession or other involuntary incriminating statement. Michael did not say *anything* incriminating during McDonough's interview. Likewise, "Aaron maintained his innocence through the end of the 9.5 hour interrogation." (App. 28.) Further, even assuming that Aaron's answers to McDonough's hypothetical questions about how each boy would have killed Stephanie were incriminating, those answers were *voluntary*. Both the state court and the district court specifically found this was so. (App. 284-85 ["[A]s a matter of law, any statements made by Aaron Houser on January 27 or February 11 were not the product of coercion."]).

Thus, the Ninth Circuit's decision in the present case not only creates confusion regarding whether garden variety police interrogation techniques constitute unconstitutional coercion, it brings into question what constitutes compelled testimony.

B. This Court Has Spoken Generally Regarding The Special Care That Must Be Taken When Interrogating Minors, But It Has Never Addressed Whether Routine Interrogation Techniques Are Coercive When Applied To Minors.

The age of the suspects does not resolve the confusion injected into the law by the Ninth Circuit's opinion in this case.

The Court has recognized that the coerciveness of the custodial setting is of heightened concern where a juvenile is under investigation. *See, e.g.*, *In re Gault*, 387 U.S. 1, 55 (1967) ("If counsel was not present for some permissible reason when an admission was obtained [from a child], the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (observing that a 14-year-old suspect could not "be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions"); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality reasoned that because a 15-year-old minor was particularly susceptible to overbearing interrogation tactics, the voluntariness of his confession could not "be judged by the more exacting standards of maturity").

But while the Court has articulated general signposts regarding the interrogation of minors – i.e., police should use the "greatest care" to ensure an admission is voluntary – it has never determined whether and when the routine interrogation techniques that were utilized by McDonough are coercive when applied to minors. The Court has never addressed whether such garden variety techniques as telling a suspect that physical evidence connects him to the crime scene or touting the accuracy of a truth

verification machine violates a minor's Fifth Amendment rights.

C. It Is Essential That The Court Grant Review To Resolve The Circuit Conflict By Confirming That The Garden Variety Interrogation Techniques Involved In This Case Do Not Violate The Fifth Amendment, And Also To Avoid Undermining Legitimate Claims Of Qualified Immunity.

The doubt that the present case sows must be resolved. If the routine techniques that McDonough utilized here violate the Constitution or if there are special rules for minors, police officers need to know, so that they can ensure that they obtain testimony that is admissible in court and avoid inadvertently violating a suspect's constitutional rights. Police academies and police departments require guidance regarding what interrogation techniques are constitutionally-permissible so that they can train officers accordingly. Moreover, public entities across the country are now vulnerable to lawsuits brought on the basis of what, until now, were well-established, judicially sanctioned interrogation techniques.

At the very least, the Court should grant review to reaffirm that officers who use routine police interrogation techniques and who do not actually compel testimony are entitled to qualified immunity. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*

v. Briggs, 475 U.S. 335, 341 (1986). For liability to be imposed, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Here, although the Court has suggested that different standards govern interrogation of minors under the Fifth Amendment, it has not provided guidance regarding whether the routine interrogation techniques that McDonough utilized here violate the Constitution. During McDonough's relatively short interviews, he calmly questioned the minor suspects using routine interrogation techniques – he suggested the physical evidence implicated the suspects, he told them the CVSA was accurate and that it showed the suspects were engaging in deception. No reasonable police officer would have known in advance that these types of accepted police practices would subsequently be deemed improper. Accordingly, McDonough is entitled to qualified immunity. *See Safford Unified Sch. Dist. #1 v. Redding*, 129 S.Ct. 2633, 2643 (2009).

III. REVIEW IS NECESSARY TO RESOLVE A CONFLICT REGARDING THE CRITICALLY IMPORTANT QUESTION WHETHER PURELY VERBAL CONDUCT NOT INCLUDING THREATS VIOLATES THE FOURTEENTH AMENDMENT.

The Ninth Circuit has broken new ground with respect to the Fourteenth Amendment, as well. Repudiating the Court's precedents and the case law of the

other circuits, the Ninth Circuit has held that purely verbal conduct devoid of any threats of harm "shocks the conscience" and therefore subjects a police officer to liability under the Fourteenth Amendment. Indeed, McDonough never raised his voice, let alone threatened the juvenile suspects in any way. Concluding that McDonough's alleged conduct nonetheless violates the Fourteenth Amendment thus represents a stark departure from the case law of the other circuits.

A. To Violate The Fourteenth Amendment's Guarantee Of Substantive Due Process, A Police Officer's Conduct Must "Shock The Conscience."

Substantive due process principles govern claims of excessive force by a police officer arising outside the context of a seizure (i.e., outside the Fourth Amendment). *See Lewis*, 523 U.S. at 843. Those principles "forbid[ ] the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience'...." *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998).

As this Court's case law makes clear, the "shocks the conscience" standard is stringent; "only the most egregious official conduct can be said to be arbitrary in a constitutional sense" – i.e., "conduct intended to injure in some way unjustifiable by any government

interest." *Lewis*, 523 U.S. at 846, 849 (internal quotation marks and citations omitted).

Courts have used various tests to identify conduct sufficiently extreme to meet this high standard, which protects the Constitution from demotion to merely "a font of tort law." *Lewis*, 523 U.S. at 847 n.8, 848. For example, courts have held that the acts must be such as to "offend even hardened sensibilities," *Rochin v. California*, 342 U.S. 165, 172 (1952), be "offensive to human dignity," *id.* at 174, "uncivilized [] and intolerable," *Hasenfus v. La Jeunesse,* 175 F.3d 68, 72 (1st Cir. 1999), or must constitute force that is brutal, inhumane, or vicious, *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996).

Negligence is not enough. *Lewis*, 523 U.S. at 849 (negligence is "categorically beneath the threshold of constitutional due process"). Rather, "the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability." *Id.* at 848.

B. Verbal Conduct Generally Does Not Rise To The Level Of A Violation Of The Fourteenth Amendment.

Until the Ninth Circuit's decision here, the well-established rule was that "conscience shocking" behavior requires far more than the psychological manipulation alleged by plaintiffs.

Substantive due process violations generally involve extreme or sustained physical brutality.[8] *See, e.g., Rochin*, 342 U.S. 165 (suspect's stomach forcibly pumped to obtain evidence); *Harrington v. Almy*, 977 F.2d 37, 43-44 (1st Cir. 1992) (suspended police officer required to undergo a penile plethysmograph as condition of reinstatement); *Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069, 1076 (11th Cir. 2000) (student blinded when coach intentionally struck him with metal weight); *Rogers v. City of Little Rock*, 152 F.3d 790, 797 (8th Cir. 1998) (rape by police officer in connection with car stop); *Hemphill v. Schott*, 141 F.3d 412, 419 (2d Cir. 1998) (police officers aided third-party in shooting plaintiff); *Webb v. McCullough*, 828 F.2d 1151, 1154 (6th Cir. 1987) (principal forced way into bathroom where student was hiding, grabbed her from floor, threw her against wall, and slapped her).

Where, as here, the conduct at issue is not physical, the "conscience-shocking" standard has traditionally been very difficult to meet. Verbal conduct or

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[8] The constitutional hurdle is so high that even the wrongful use of *physical force* may not constitute a substantive due process violation. *See, e.g., Cummings v. McIntire*, 271 F.3d 341, 342-45 (1st Cir. 2001) (affirming summary judgment in favor of police officer who "unnecessarily utilized physical force" against a pedestrian; held, officer's conduct "though deplorable, unprofessional and offensive – did not 'shock the conscience,' and thus fell short of establishing a constitutional violation"; officer did not push plaintiff "maliciously and sadistically for the very purpose of causing harm").

harassment generally does not suffice. *See, e.g., Emmons v McLaughlin*, 874 F.2d 351, 353 (6th Cir. 1989) (threats causing fear for plaintiff's life not an infringement of constitutional right); *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979) (allegations that sheriff laughed at prisoner and threatened to "hang him" not sufficient to establish a constitutional violation); *Lamar v. Steele*, 698 F.2d 1286 (5th Cir. 1983) (claim based on "mere words" or "idle threats" not sufficient to establish a violation of substantive due process); *Bibbo v. Mulhern*, 621 F.Supp. 1018, 1025 (D. Mass. 1985) (verbal abuse and harassment falling short of physical force was not the type of conduct for which substantive due process provides redress); *see also Fox v. Hayes*, 600 F.3d 819, 841 (7th Cir. 2010) (summarizing the "shocks the conscience" standard as: "For example, on the one hand, forcing an emetic down a person's throat to forcibly extract evidence from a suspect's stomach shocks the conscience, but on the other hand, lying to, threatening, or insulting a suspect does not." (internal citations omitted)).

This is so because "[t]he Constitution does not protect against all intrusions on one's peace of mind. Fear or emotional injury which results solely from verbal harassment or idle threats is generally not sufficient to constitute an invasion of an identified liberty interest." *Pittsley v. Warish*, 927 F.2d 3, 7 (1st Cir. 1991) ("*Pittsley*").

Thus, in *Cruz-Erazo v. Rivera-Montanez*, 212 F.3d 617 (1st Cir. 2000), the First Circuit found no

substantive due process violation even where police officers verbally harassed plaintiff homeowners, intimidated them, occupied their property without permission, deliberately lied in official documents, and perjured themselves in official court proceedings with the intention of causing the homeowners harm.

Likewise, in *Souza v. Pina*, 53 F.3d 423 (1st Cir. 1995), the Court found no substantive due process violation when a murder suspect committed suicide after prosecutors encouraged the media to link him to a series of murders. While the First Circuit lamented the conduct of the prosecutors in that case, it held that the facts alleged simply did not rise to the level of conscience-shocking conduct. *See id.* at 427.

Only a handful of cases have found verbal conduct extreme enough to meet the "shock the conscience" standards. Those cases invariably involve some sort of imminent, credible threat to the plaintiff. *See, e.g.*, *Belcher v. Norton*, 497 F.3d 742, 753-54 (7th Cir. 2007) (deputy marshal forced plaintiff to sign over title to his car by threatening to arrest him for disorderly conduct, approaching him with handcuffs and telling him that he was calling for backup);[9] *Meeker v. Edmundson*, 415 F.3d 317, 322-23 (4th Cir. 2005) (allegation that wrestling coach "initiated and

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[9] The dissent in *Belcher* would have rejected a Fourteenth Amendment claim because the marshal made no physical threat, "did not use physical force or violence, did not taunt or mock them, did not use racial or sexual epitaphs, nor did he subject them to public ridicule." *Id.* at 756.

encouraged" students to physically abuse student could support substantive due process claim even if coach did not actually administer the beatings himself); *Hawkins v. Holloway*, 316 F.3d 777 (8th Cir. 2003) (allegation that sheriff pointed gun at his employees and threatened to shoot them stated substantive due process claim, but allegations of abrasive conduct and verbal harassment did not); *Burton v. Livingston*, 791 F.2d 97, 99-100 (8th Cir. 1986) (Although "in the usual case mere words, without more, do not invade a federally protected right," prison guard's conduct violated Fourteenth Amendment where he "pointed a lethal weapon at the prisoner, cocked it, and threatened him with instant death.").

The only exception to the rule that the only verbal conduct that "shocks the conscience" is an imminent threat, is *Cooper*, 963 F.2d 1220. In *Cooper*, the police conducted an unlawful interrogation in a *deliberate* and *premeditated* attempt to prevent a suspect from testifying at his own trial or invoking an insanity plea. *Id.* at 1249-50. This conduct shocked the conscience because its *intended purpose* was to deprive the suspect of his constitutionally-guaranteed right to defend himself. *Id.* ("The primary aggravating circumstance is the Task Force's purpose of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense – as Taylor said, 'to help keep him off the stand.'"), (police intended to "impinge on the suspect's right to remain silent or his right to testify"), ("purpose was to deprive a suspect of

the [insanity] defense altogether, not just to defeat it with the facts or the truth").[10]

C. A Suspect's Juvenile Status Would Not Render McDonough's Calm, Purely Verbal Conduct A Violation Of The Fourteenth Amendment.

While the Ninth Circuit suggests that the "shocks the conscience" standard should be lower for juveniles (App. 46), it conspicuously fails to cite case law suggesting the manner of interrogation employed by McDonough here rises to such an impermissible level. In fact, the courts have routinely rejected the notion that conduct falling short of physical abuse suffices, even as to juveniles.

For example, in *Pittsley*, police officers told two young children – ages four and ten – that "if we see your father on the street again, you'll never see him

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[10] The aggravating circumstances that rendered the purely verbal conduct in *Cooper* "conscience-shocking" – i.e., the widespread conspiracy to deprive the suspect of his ability to defend himself at trial – is not present here. Nothing in the record suggests that McDonough was part of an "unlawful plot to deprive an accused suspect of the privilege of testifying in his own defense." *Id.* at 1250. McDonough had no motive to frame the boys; he had no prior relationship with Escondido or any animosity towards the boys. Nor did McDonough have any control over Escondido's criminal investigations. His limited role was to administer the CVSA examinations – examinations that the undisputed evidence showed McDonough believed would yield the facts or the truth.

again."[11] 927 F.2d at 5. When the police subsequently arrested the suspect, they "use[d] vulgar language" and refused to let the children give him a hug and kiss goodbye. *Id.* Nonetheless, the court held: "The officers' actions and statements made directly to the children did not constitute a violation of any protected liberty interest. The acts complained of did not result in a physical touching or physical injury, and, thus, fall short of the type of conduct which the due process clause was intended to protect." *Id.* at 9. The court expressly rejected Pittsley's argument that the vulnerability of the young children made the arresting officer's actions and language "so brutal, offensive and intimidating as to 'shock the conscience.'" *Id.* at 7. It held: "The children's alleged fear or trauma which resulted from these spoken words and actions in this instance ... [was] not sufficient to rise to the level of a constitutional violation under the standard enunciated in *Rochin*." *Id.*

Similarly, in *Robertson v. Plano City of Texas*, 70 F.3d 21 (5th Cir. 1995), the Fifth Circuit held that a 16-year-old burglary suspect's parents could not establish that the police had violated his substantive due process rights when they came to his house, notified him that he was a suspect, failed to give him *Miranda* warnings, questioned him and knowingly admonished him about the adult penalties for car

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[11] The suspect was the children's mother's live-in companion, not the children's biological father.

burglary despite the fact that they knew he was a minor. The court held that "neither Fourteenth Amendment case law, nor case law construing other constitutional requirements ... afforded the Robertsons' son (16 years old) a right to be free from an erroneous admonishment regarding punishment and prison." *Id.* at 24. Noting the case law holding that verbal threats by police without more do not violate the constitution, the Fifth Circuit held that the juvenile suspect could not state a claim. *Id.* at 25. It observed: "Jonathan's status (16-year-old juvenile) [does not] create an exception to the general rule." *Id.*

D. The Court Should Grant Review To Resolve The Circuit Conflict, Bar The Amorphous Constitutional Tort That The Ninth Circuit Has Created, And Avoid Undermining Legitimate Claims Of Qualified Immunity.

It is critical that the Court resolve the split among the circuits created by the Ninth Circuit's opinion in this case regarding what constitutes a "conscience-shocking" interrogation, and whether there is a special rule for minors. The Ninth Circuit has repudiated the case law of the other circuits by holding that non-threatening verbal conduct "shocks the conscience," subjecting a defendant to Fourteenth Amendment liability. This groundbreaking holding will open the floodgates of litigation. Police departments across the country will be subject to litigation

on the basis of amorphous standards that vary from courtroom to courtroom.

This case illustrates the problem. The district court and the trial court (in the underlying criminal case) listened to the same tape recordings of the interviews and found that McDonough's conduct was not extreme or outrageous. In fact, they concluded that the suspects' statements were voluntary and not coerced. Nonetheless, the Ninth Circuit reviewing the same material concluded a jury could find that the statements were coerced and indeed that the interrogations shocked the conscience.

It is essential that the Court grant review to close the door on this sort of amorphous constitutional tort subject to widely varying sensibilities. Indeed, the Court has been "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). The Court has cautioned that it must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [federal judges].'" *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

At the very least, the Court should grant review to make it clear that McDonough – and police officers like him – are entitled to qualified immunity. The doctrine of qualified immunity protects government

officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Here, it is difficult to imagine a less clear constitutional violation. In light of the governing law described above, no reasonable officer would have believed that McDonough's calm, measured tone and relatively innocuous questions constituted a "conscience-shocking" interrogation. During the litigation Michael described McDonough as "an affable, friendly sounding man" who "referred to Michael as 'son.'" (4 JER 768-73 [answers to contention interrogatories].) This is at the opposite end of the spectrum from the credible threats of harm that characterize the handful of cases finding solely verbal conduct to be conscience-shocking.

While McDonough's interview of Aaron was longer and more persistent than that of Michael, it did not approach the brutality necessary to trigger the constitutional standard. Again, McDonough maintained a calm, even tone and never threatened Aaron with any kind of harm. Although the interview was longer than that of Michael, McDonough's persistence makes sense in context. *See Lewis*, 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another."). McDonough had just heard Joshua Treadway *voluntarily* explain how Aaron had planned the murder, stabbed Stephanie to death, and then

threatened to kill Josh's entire family if anyone ever found out. (*See* App. 30, 205-206, 256-57, 261 [district court finds Joshua's statements voluntary].) Any reasonable police officer would have followed up with Aaron to attempt to corroborate Joshua's story.

Given the facts of this case and the uniformity of the case law establishing stringent standards for when solely verbal conduct shocks the conscience, it would not be foreseeable to a reasonable officer that the interrogation techniques that McDonough employed, even as to minors, would subsequently be deemed constitutionally improper. Accordingly, McDonough is entitled to qualified immunity.

IV. REVIEW IS NECESSARY TO RESOLVE THE CIRCUIT CONFLICT CREATED BY THE NINTH CIRCUIT'S REJECTION OF THE "SHOCKS THE CONSCIENCE" STANDARD AS TO FOURTEENTH AMENDMENT CLAIMS FOR DEPRIVATION OF FAMILIAL RELATIONSHIP.

The Court was unequivocal in *Lewis*, 523 U.S. 833: *All* Fourteenth Amendment substantive due process claims are subject to the "shocks the conscience" standard. *See id.* at 846-9 & n.8 ("in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience").

Yet here, remarkably, the Ninth Circuit has expressly rejected the "shocks the conscience" standard that has long been the threshold requirement for all Fourteenth Amendment violations. The Ninth Circuit held: "Defendants argue that the correct standard is whether defendants' conduct 'shocked the conscience.' There is no support in the relevant case law for this assertion. The standard for deprivation of familial companionship is 'unwarranted interference,' not conduct which 'shocks the conscience.'" (App. 70 n.23.)

With this holding, the Ninth Circuit has upset the clear standard this Court has created for all Fourteenth Amendment violations, carving out a special rule for substantive due process claims alleging deprivation of a familial relationship. There is no justification for the Ninth Circuit's action.

In fact, other opinions from the circuit courts – and even prior opinions from the Ninth Circuit – have regularly applied the "shocks the conscience" standard to claims of deprivation of familial companionship. For example, in *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), the Ninth Circuit held: "This circuit has recognized that parents have a Fourteenth Amendment liberty interest in the companionship and society of their children. Official conduct that 'shocks the conscience' in depriving parents of that interest is cognizable as a violation of due process." *Id.* at 554 (internal citations omitted; holding that officer shooting did not violate victim's family's liberty interest in his companionship because officer had no

purpose to harm victim apart from legitimate law enforcement objectives); *Griffin v. Strong*, 983 F.2d 1544, 1548-49 (10th Cir. 1993) (finding no violation of familial right of association where the alleged intrusion – falsely telling plaintiff that her husband had confessed to abusing their child and encouraging her to start her life over – did not involve physical coercion or conduct that shocks the conscience).

The Court should grant review to bring the Ninth Circuit in line with *Lewis* and with the other circuits that have held that the "shocks the conscience" standard governs *all* substantive due process claims. The issue is critical because any detention of a minor – by police, social services or any other agency – raises the specter of a deprivation of familial companionship claim. It is essential that the Court resolve the conflict and eliminate the confusion wrought by the Ninth Circuit's opinion.

CONCLUSION

For the foregoing reasons, petitioner urges that the petition be granted.

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Respectfully submitted,

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